SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1475

FRED E. WILSON ---------- PETITIONER

vs.

MERRITT S. DEITZ, JR., as COMMISSIONER OF ECONOMIC SECURITY, etc., ---------- RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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The respondent does not question the jurisdictional statement or the questions presented by the petitioner, however, it is believed that the statement of the case should be clarified.

COUNTER STATEMENT OF THE CASE

Except for the following, the respondent accepts the petitioners' statement.

In the second and third literary paragraphs of the statement contained on Page 4 of the Petition, the petitioner indicates that the District Court Order, which was affirmed by the Sixth Circuit Court of Appeals, required that a welfare recipient make a more or less formal request before the state agency is required to grant a pre-termination evidentiary hearing. Such is not so.

We direct the Court's attention to Appendix 2, the second literary paragraph on Page 17 of the Petition for Certiorari, and point out that the District Court directed, in part, as follows:

> "The Court directs that all recipients who have been so removed and who have in writing *or otherwise made known* to the Social Worker or Bureau of Public Assistance that he or she objected to, and complained of their removal, and who have indicated a desire to be heard on the propriety of the discontinuance of their grant, be restored to the eligibility rolls effective as of their individual cut-off date, and that money grants be made to them for the interim following said date, and unto the date they are afforded an opportunity for a pre-termination evidentiary hearing in accordance with the rule laid down above with respect to the individual plaintiff herein."

The Court had earlier in the Order directed that Wilson be returned to the eligibility rolls, given retroactive payments for the time he was off the rolls, and not again declared ineligible until he was granted an opportunity for a pre-termination evidentiary hearing. The respondent complied with the Court's Order, returned Wilson to the eligibility rolls, searched files to find those of his class, returned them to the rolls, and they were not again removed as ineligible until they were afforded opportunity for a pre-termination evidentiary hearing.

ARGUMENTS

QUESTION PRESENTED

1. WHETHER A STATE WELFARE RECIPIENT MUST OBJECT TO A PROPOSED TERMINATION OF HIS OR HER GRANT AND REQUEST A HEARING THEREON BEFORE BEING ENTITLED TO A FAIR EVIDENTIARY PRE-TERMINATION HEARING.

The petitioner has taken the position that the decision in *Goldberg v. Kelly*, 397 U. S. 254, 25 L. Ed. 2nd 287, 90 S. Ct.

1011, requires a state welfare agency to actually conduct a pre-termination evidentiary hearing before welfare payments to a recipient can be terminated (and now reduced). This position is maintained notwithstanding the recipients failure to make an objection to the proposed termination (after notification of the intent to terminate) or to otherwise complain about it. The respondent maintains that due process does not require the conduct of a hearing unless it is in some manner, formally or informally, indicated by the recipient that he desires to be heard.

The petitioner, on Page 5, second paragraph, very explicitly sets out the Goldberg requirements of due process. We agree that *Goldberg* does provide those guidelines, but we point out to the Court that nowhere is it stated in *Goldberg*, nor does the petitioner quote *Goldberg* as saying that a hearing must be conducted without the recipient indicating he wants to be heard. During the oral arguments before a Three-Judge panel in the Sixth Circuit Court of Appeals, Judge Edwards very pointedly asked of counsel for the petitioner, Mr. Glenn, "Where, in *Goldberg*, does it say that a hearing must be conducted, even though the recipient has not requested one or objected to the termination?" Counsel for the petitioner was not able to answer the question then, and they have not pointed out to this Court in their Petition where *Goldberg* mandates a hearing not requested by the affected recipient.

In fact, *Goldberg* is replete with the phrase, "*OPPORTUNITY FOR A HEARING*". We find in the Opinion of Justice Brennan, 397 U. S. 254 at Page 266, the following excerpt: (Our Emphasis)

> "As the District Court correctly concluded, '(t)he stakes are simply too high . . . to allow termination of aid without *giving the recipient a chance, if he so desires,* . . . to produce evidence in rebuttal' ". (Our Emphasis)

In *Goldberg*, in concurring, Justice Harlan wrote, at Page 267-271:

> "We . . . recognize the importance of not imposing . . . any procedural requirements beyond those demanded by rudimentary due process.
>
> The fundamental requisite of due process of law is the *opportunity* to be heard." *Grannis vs. Ordean,* 235, U. S. 385, 394 (1914). . . . These rights are important in cases such as those before us, where recipients have challenged proposed terminations. . . ."
>
> Further, Justice Harlan wrote, at Page 269: "In almost every setting, when important decisions turn on question of fact, due process requires an *opportunity* to confront and cross-examine adverse witnesses." Citations) (Emphasis ours).

At the time Wilson and his class were removed from the rolls, the Kentucky Agency had not had time to implement the new procedures required by *Goldberg.* It was admitted in the District Court that we had not complied. However, by the time the case came up for trial, the procedures had been established. After making the retroactive payments required by the District Court, the new procedures were employed, a pre-termination evidentiary hearing was conducted, after notice of the intent to terminate and after Wilson had requested it, and he was again terminated. He appealed through the administrative process and his case now is in the Kentucky Circuit Court pending being assigned for hearing.

The petitioner cites on Page 7 and 8 the case of *Richardson, Secretary of HEW, vs. Wright* (February 24, 1972), ____ U. S. ____ 31 L. Ed. 2nd 151, 91 S. Ct. _____. Mr. Justice Brennan's dissenting Opinion was brought to attention and it appears the petitioner represents it to be authority for the position they have taken in this case. We can not see where the petitioner gains any solace from Mr. Justice Brennan's Opinion. We refer the Court to *40 Law Week 4237,* where Mr. Justice Brennan wrote, in part, the following:

> ". . . If to provide prior hearings, terminations were delayed for two months, the Secretary says, the cost in

> benefits paid pending the hearing would approach $16 million. It is immediately apparent that this figure is grossly inflated.
>
> First, this figure depends upon the unwarranted assumption that all beneficiaries will demand a prior hearing. The Secretary suggests no reason to suppose that would happen.
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> • • • • • •
>
> Second, the $16 million figure requires not only that all 38,000 beneficiaries request prior hearings, but also that they all lose.
>
> • • • • • •
>
> Third, not only must every beneficiary request a prior hearing and every hearing affirm cessation of disability, it must also be true to reach the $16 million figure that the Secretary will be unable to recover any of the benefits paid to the beneficiaries pending hearing."

It is obvious that Mr. Justice Brennan, who authored the Opinion of the Court in *Goldberg vs. Kelly, supra,* recognizes that a pre-termination evidentiary hearing is not necessary unless the recipient requests it. Mr. Justice Brennan used the words "demand a prior hearing".

In addition to the above authority that a request must be made before it is necessary to conduct a hearing, we refer the Court to 45 C. F. R. 205.10 (a) (3) where under the procedures adopted by the Department of Health, Education & Welfare, for the administration of the public assistance programs, it requires that a State give opportunity for a hearing to any individual who requests a hearing, and the regulation goes on in the next paragraph (i) and defines what shall be accepted as a request for a hearing. The regulation was adopted after *Goldberg* was handed down.

It has been suggested that if the agency did set up a hearing and drag the unwilling recipient into attendance at it, although the hearing was not requested, that the agency or its personnel

would be violating some other Constitutional right of the recipient.

QUESTION PRESENTED

2. WHETHER A STATE WELFARE RECIPIENT IS ENTITLED TO CONTINUE TO RECEIVE BENEFITS UNDER HIS OR HER GRANT PRIOR TO A FINAL AND UNAPPEALABLE ADMINISTRATIVE DECISION BASED UPON A FAIR EVIDENTIARY PRE-TERMINATION HEARING?

We believe a fair interpretation of this question would be that a recipient would be maintained on the rolls throughout the period that statutes and regulations provide for him to appeal adverse decisions. We believe that it would mean that although a recipient was determined ineligible after a pre-termination evidentiary hearing, he would remain on the rolls until a fair hearing was conducted if he appealed the previous determination; that if he again appealed from the fair hearing decision, he would remain on the rolls until the Appeal Board handed down the last available administrative hearing, and if he appealed to the Kentucky Courts, he would remain on the rolls until the Kentucky Court of Appeals passed on the case, and then possibly he would have an appeal to the Supreme Court. As most welfare recipients make their administrative and judicial appeals in forma pauperis, it would mean that if they so desired, that they could remain on the rolls for one and one-half to two and one-half years, merely by availing themselves of the appellate procedures. It would mean that the Supreme Court of the United States or the Court of Appeals of Kentucky would decide the eligibility or ineligibility of all welfare recipients.

The import of the situation makes it border on the ridiculous. This is especially so when we look at *Goldberg* and its background and see how it arose. We call to the Court's attention that *Goldberg* was brought up to determine the constitutionality of a

procedure followed by the New York City agency. The procedure contested was that the New York City agency would inform a recipient that he was to be removed from the rolls and only affording him the opportunity to write a letter back indicating why he shouldn't be removed. This Court, in *Goldberg*, said such would not serve due process; that opportunity for confrontation should be had with the right to cross-examine, etc. Once a due process pre-termination evidentiary hearing is conducted, it is permissible to remove the recipient from the rolls if the evidence supports such action. Such reduces the chance of error or misjudgment and satisfies all constitutional rights a person has to welfare benefits.

CONCLUSIONS

The respondent respectfully submits that the two lower courts properly decided the issues made in this case, and that the Writ of Certiorari should be denied.

Respectfully submitted,

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